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89-306 ①

Supreme Court, U.S.
FILED
AUG 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. ____________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Malcolm T. Riley, III, Petitioner

vs.

United Parcel Service, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Malcolm T. Riley, III , pro se
12 Stalwart Drive
Newark, DE. 19713
(302)368-2776

45 pp

QUESTIONS PRESENTED

1. Did the District Court improperly apply Title VII evidentiary standards and improperly conclude that the Petitioner did not establish that the Respondent's reasons for discharge were pretextual?
2. Did the District Court improperly conclude that the Respondent discharged the Petitioner solely because of his work record?
3. Did the District Court improperly conclude that there was no evidence of disparate treatment towards the Petitioner and that race was not a determining factor in the Petitioner's discharge?
4. Did the District Court improperly enter judgement in favor of the Respondents?

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TABLE OF AUTHORITIES

Bellissimo v. Westinghouse Electric Corp. , 764 F2d 175 (1985).

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Smithers v. Bailar, 629 F2d 892,898 (3rd Cir. 1980)

OPINIONS BELOW

A Memorandum Opinion was issued by the Honorable Joseph J. Farnan (United States District Court for the District of Delaware) on June 30, 1988. A true and correct copy of same is annexed hereto as Exhibit "C". An order affirming this Judgement was issued by the United States Court of Appeals for the Third Circuit on April 3, 1989. A true and correct copy of same is annexed hereto as Exhibit "A".

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sections 1981 and 2000 (e).

GROUNDS FOR JURISDICTION

On April 3, 1989, the United States Court of Appeals for the Third Circuit denied the Petitioner's Request for a Rehearing en Banc and affirmed the Judgement Order of the District Court for the District of Delaware. A true and correct copy of this order is annexed hereto as Exhibit "B".

STATEMENT OF THE CASE

The Petitioner brought this action before the United States District Court in the District of Delaware.

After a bench trial held before the Honorable Judge Joseph J. Farnan on September 21 through 23 of 1987, a Judgement was entered by Judge Farnan in favor of the Respondent. After a timely appeal to the Third Circuit Court of Appeals, the Lower Court Judgement was affirmed on April 3, 1989. A request for Rehearing en Banc was filed on April 17, 1989 and was denied on May 3, 1989 wherein the original Judgement was affirmed. These documents are attached hereto as Exhibits "A", "B", and "C".

REASONS FOR GRANTING WRIT

The District Court Judge improperly applied Title VII evidentiary standards and improperly concluded that the Petitioner did not establish that the Respondent's reasons for discharge were pretextual.

The District Court improperly concluded that the Respondent discharged the Petitioner solely because of his work record.

The District Court improperly concluded that there was no evidence of disparate treatment towards the Petitioner and that race was not a determining factor in the Petitioner's discharge.

The District Court improperly entered judgement in favor of the Respondents.

The District Court Judge presiding over this case relied on a myriad of inaccurate information when arriving at his decision. The Judge did not take into account all of the information available to him and he put a substantial amount of emphasis on data that the Respondent admittedly could not substantiate. On more than several occasions, the Judge overlooked evidence **despite** documentation supporting the same.

Additionally, the Petitioner was subject to harsher disclipline and was treated differently than other similarly situated employees solely because of his race and color.

As can be vigorously substantiated by volumes of Court transcripts and depositions, the Respondent had only two weeks in which to discharge the Petitioner or the statute of limitations would have

rendered information upon which the Respondent heavily relied useless. A medically documented case of strep throat coupled with a lateness of less than two minutes do not separately or cumulatively constitute grounds for discharge unless the discharge was pretextual.

The Petitioner substantiated the fact that the Respondent intentionally lied to and misled the Equal Opportunity Employment Commission in their investigation of this claim. The Third Circuit Court of Appeals seemed to overlook this information as well as a multitude of other relevant data that is instrumental in understanding the particulars of the Respondent's unlawful actions against the Petitioner. The Respondent had no knowledge of information requested in the sets of interrogatories that the Petitioner

helped the EEOC to compose --however the previously sanitized information mysteriously reappeared when this case got to the District Court level. The Respondent had "no knowledge or records" of several key issues that would have definitely changed the outcome of the EEOC's proceedings.

The Petitioner also vigorously substantiated the fact that all disciplinary write-ups levied upon him were levied by temporary supervisors -- not by the Petitioner's regular supervisor who was on vacation when all of the unwarranted disciplinary measures necessary for discharge were imposed.

Ambiguous charges about the Petitioner's conduct were entered into his personnel folder--regardless of the illegitimacy of the charges. At the eleventh hour, the Respondent used

shotgun techniques for discipline revolving around issues that were trivial. The Respondent repeatedly "dressed up" trivalities to appear as major acts of intentional misconduct to a casual observer, however when company policy--the standard that **everyone** was supposed to be subjected to--was examined, the issues in question were not even grounds for discipline. On numerous occasions, the Respondent cited progressive discipline even though the Petitioner was never guilty of the infractions of which he was acused.

The Petitioner was subject to disciplinary write-ups that he had no idea even existed--let alone had accumulated--until years after his racially motivated discharge from employment.

The Petitioner is prepared to show

clear, concise, examples of disparate treatment, similarly situated caucasion employees that were treated more favorably than he, and clear pretextual reasons for his eventual discharge.

This case involves at least six and one-half years of litigation. An objective approach to the specifics and details contained in the totality of information available will render a litany of facts that show that the reasons for discharge were pretextual and were racially motivated.

In *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973) the Supreme Court announced the manner in which discrimination must be established:
(1) the employee must show a prima facie case of discrimination, (2) once a prima facie case has been shown, the burden shifts to the employer to articulate some non-discriminatory reason for the action,

and (3) if such a reason legitimately proffered, the employee bears the burden of demonstrating that the employer's reason is a mere pretext.

It is asserted by the Petitioner that a prima facie case was clearly established. The employer failed to prove a "non-discriminatory" reason for the Petitioner's discharge. The Petitioner demonstrated his competence at his employer's business and further demonstrated that similarly-situated employees were treated disparately by the Respondent.

In Bellissimo v. Westinghouse Electric Corp., 764 F2d 175 (1985) establishes the standard by which the Plaintiff must prove that the Defendant discriminated against him. This is by

way of a "but for" test. The "but for" test does not require a Plaintiff to prove that the discriminatory reason was <u>the</u> determinative factor, but that it was <u>a</u> determinative factor. See also <u>Smithers v. Bailar</u>, 629 f2d 892, 898 (3rd cir. 1980).

Under all of these circumstances, this Petitioner respectfully prays that this Honorable Court review these contentions and conclude that **at least** some additional investigation into **or** a careful re-evaluation of existing documents and Court Records be performed so that the specifics surrounding the Respondent's unlawful discharge of the Petitioner can be clearly understood. Careful study of the details surrounding all of these issues is **imperative** so that the "smokescreen" that the Respondent used will be dissipated.

The District Court Judge improperly applied Title VII evidentiary standards, improperly concluded that the Petitioner did not establish that the Respondent's reasons for discharge were pretextual, improperly concluded that the Respondent discharged the Petitioner solely because of his work record, improperly concluded that there was no evidence of disparate treatment towards the Petitioner, that race was not a determining factor in the Petitioner's discharge, and the Court improperly entered judgement in favor of the Respondents.

CONCLUSION

For all of the reasons above expressed, the Petitioner, Malcolm T. Riley, III respectfully prays that this Honorable Court grant Certiorari and other such relief as may be necessary and appropriate in the interest of justice.

Respectfully submitted,

Malcolm T. Riley, III, pro se

CERTIFICATE OF SERVICE

I, Malcolm T. Riley, III, hereby certify that three true and correct copies of the foregoing Petition for a Writ of Certiorari have been served upon:

Martin Wald, Esquire
c/o Schnader, Harrison, Segal and Lewis
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

via United States Mail.

Malcolm T. Riley,III, pro se

Office of the Clerk
Telephone
215 597-2995

UNITED STATES COURT OF APPEALS

Sally Mrvos
Clerk
Direct Dial-
597-8465

For the Third Circuit
21400 United States Courthouse
801 Market Street
Philadelphia 19106-1790

May 11, 1989

Mr. John R. McAllister, Jr. ,Clerk
U. S. District Court
Lock Box 18,Federal Bldg.
844 King St.,
Wilmington, DE. 19801

Re: Malcolm T. Riley, III, Appellant
vs. United Parcel
No. 88-3482
(D.C.Civ.No.83-811)

Dear Clerk:

Enclosed is a certified copy of the judgment order in the above-entitled case(s). The certified judgment order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Exhibit "A"

(X) We return herewith the
certified record in the case(s).

( ) We release herewith the
certified lest in lieu of the
record.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very Truly yours,

M. Elizabeth Ferguson
Chief Deputy Clerk

bj:
Enclosure

cc: Mr. Malcolm T. Riley, III
Martin Wald, Esq.

DC-JO

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3482

MALCOLM T. RILEY, III
Appellant

vs.

UNITED PARCEL SERVICE

On Appeal From the United States District Court For the District of Delaware (D.C. Civil Action No. 83-811) District Judge: Honorable Joseph J. Farnan, Jr.

Submitted March 27, 1989

BEFORE: STAPLETON, GREENBERG, AND SCIRICA, *Circuit Judges*

JUDGEMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

Walter K. Stapleton
Circuit Judge

ATTEST:

Sally Mrvos
Clerk

Dated: Apr 3 1989

Certified as a true copy and issued in lieu of a formal mandate on May 11, 1989

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

COPY

Office of the Clerk Telephone
215 597-2995
UNITED STATES COURT OF APPEALS

Sally Mrvos
Clerk Direct Dial-
For the Third Circuit
21400 United States Courthouse 597-8465
601 Market Street
Philadelphia 19106-1790

May 3, 1989

Mr. Malcolm T. Riley, III

Martin Wald, Esq.

Re: Malcolm T. Riley, III, Appellant
vs. United Parcel Service
<u>No. 88-3482</u>

Dear Mr. Riley and Counsel:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case.

Very truly yours,

M. Elizabeth Ferguson/ch
Cheif Deputy Clerk
Direct Dial - 597-3143

Exhibit "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3482

MALCOLM T. RILEY, III
Appellant

vs.

UNITED PARCEL SERVICE

SUR PETITION FOR REHEARING

BEFORE; GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred

in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated: May 3, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MALCOLM T. RILEY, II,	:	
	:	
Plaintiff,	:	
	:	Civil Action No. 83-811-JJF
v.	:	
	:	
UNITED PARCEL SERVICE,	:	
	:	
Defendant.	:	

David S. Lank, Esquire, of Theisen, Lank, Mulford & Goldberg, Wilmington, Delaware. Attorney for Plaintiff.

James J. Woods, Jr., Esquire, of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware. Martin Wald, Esquire, of Schbader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania. Attorneys for Defendant.

MEMORANDUM OPINION

June 30, 1988

Wilmington, Delaware

Exhibit "C"

Joseph J. Farnan, Jr.
FARNAN, District Judge

Plaintiff, Malcolm T. Riley, III, brought this action for damages allegedy suffered due to his final discharge from his employment with the defendant, United Parcel Service. Plaintiff contends that he was discharged on the basis of his race. Plaintiff's cause of action arises under 42 U.S C. Sections 1981 and 2000(e) and the Court has subject matter jurisdiction under 28 U.S.C. Sections 1331 and 1343.

The Court conducted a three day bench trial in this action and, following the conclusion of trial, reviewed proposed findings of fact and conclusions of law submitted by the parties. This opinion constitutes the Court's Findings of fact and conclusions of law submitted by the parties. Conclusions of Law under Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Plaintiff is a black citizen of the United States and a resident of the State of Delaware.

2. UPS was and is engaged in the business of transfer and delivery of packages and has been, at all times relevant to this lawsuit, an employer engaged in an industry affecting commerce within the meaning of 42 U.S.C. section 2000e(b)(g) and (h).

3. UPS hired Riley on or about September 2, 1980, as a parcel unloader and sorter during the "pre-Christmas busy season." At the end of the pre-Christmas busy season in December, 1980, plaintiff was laid off and placed in "on-call status" from January to April, 1981. As an on-call employee, Riley was called by UPS when he was needed for work on a particular shift. In April, 1981, Riley

attained the status of a regular part full-time employee. The plaintiff's employment with UPS was terminated on April 16, 1982. During his employment with UPS, Riley either worked at the defendant's facilities in Wilmington, Delaware or in Newark, Delaware.

4. As an employee at UPS, plaintiff was covered by the provisions of the Collective Bargaining Agreement between UPS and Local 326 of the International Brotherhood of Teamsters. The Collective Bargaining Agreement provided, in relevant part, "The employer shall not discharge nor suspend any employee without just cause, but in respect to discharge shall give at least one (1) warning notice of a complaint against such employee to the employee in writing, and a copy of the same to the Union and Job Steward affected. . . ." An employee's warning notice would only remain

in effect for a period of nine months from the date it was issued. For a limited number of serious offenses, such as proven theft or dishonesty, an employee could be discharged without first receiving a warning notice.

5. Riley worked as an unloader for approximately his first two months at UPS. As an unloader, Riley was responsible for unloading packages from a delivery truck and placing the packages on a set of rollers. The package would them "roll" up to the sorter, who was the next person to handle the package. The sorters were required to take the package, read the address, and then place the package in one of a series of bins or belts based on the destination of the package.

6. UPS employs a system of "progressive discipline" involving informal and formal disciplinary measures for

workers who violate company work rules or procedures. The possible disciplinary measures for a given infraction include informal verbal counselings, verbal warnings, write-ups placed in an employee's file, center level hearings, Official Warning Letters, Suspensions, Final Warnings, and Discharge. UPS considers an employee's entire work record in determining appropriate discipline for a given infraction.

7. Malcolm Riley was constantly disciplined by managers and supervisors during his brief employment with UPS. Riley received numerous informal verbal counselings from supervisors concerning his work methods and level of performance. On one occasion, Riley's immediate supervisor, Carol Mack, verbally admonished him for urinating against a wall at the UPS facility when a bathroom was located within

twenty-five feet.

8. During his approximate twenty month employment at UPS, Riley received a total of forty-eight write-ups for violations of UPS rules and procedures from eight separate supervisors. These write-ups included the following infractions: lateness, excessive absenteeism, failing to call in and report an absense in advance of the shift start, slow sorting, improper sorting methods, poor attitude, attempting to intentionally slow down the work rate, improper package handling, smoking in an unauthorized area, unacceptable level of missorts of packages, and intentionally throwing packages. On at least three occasions, Riley was instructed by his supervisor to stand at a 45 degree angle to the sort belt and sort the packages to his right. Defendant's exhibit 6, 13, and 24. UPS had determined that this was the

safest means to sort packages. On each occcasion, the plaintiff returned to his work station and, in complete disregard of his supervisor's instructions, began sorting packages to his left side.

9. Plaintiff received an Official Warning Letter for unacceptable attendance and for failure to follow instructions on February 5, 1981. Riley later received two additional Official Warning Letters for unacceptable attendance dated March 9, 1981, and July 17, 1981. Each warning letter informed Riley that further violation of UPS work rules would subject him "to further displinary action, up to and including discharge."

10. The plaintiff was suspended on August 8, 1981 and October 13, 1981, for unacceptable attendance. On February 25, 1982, Riley was suspended for throwing a package at a truck unloader. Riley was

also issued a Final Warning Letter on this date which informed him that any failure to follow company methods and procedures, or failure to follow a supervisor's instructions in the future, would result in his discharge.

11. On April 6, 1982, plaintiff reported to work late. On April 9, 1982, plaintiff was scheduled to start work at 4:30 a.m. but called in sick at 5:05 a.m. On April 13, 1982, Riley was again scheduled to work the 4:30 a.m. shift and called in sick at 4:25 a.m. UPS had instructed its employees to call in at least one half hour before the start of their shift if they would be unable to report to work. On April 7 and april 8, 1982, Riley missorted an unacceptable number of packages because he eas not reading the entire address lavel as he had been instructed by his supervisors.

12. On April 14, 1982, UPS reviewed

Riley's complete work record and based on this review, UPS discharged him because of his "continual failure to follow instructions, company methods and procedures, and overall work record."

13. Supervisors at UPS were given discretion by management in deciding whether to formally or informally discipline an employee. There is no evidence that supervisors abused their discretion in disciplining employees or that black employees were discciplined more harshly than white employees.

14. Plaintiff introduced evidence concerning the work records of three white employees in an effort to show disparate treatment. Those employees were Keith Krug, Charles Parks, and Mark Caine and all were unloaders at UPS. Caine also worked for a brief period as a sorter.

15. Neither Keith Krug nor Charles

Parks testified at trial and there was no testimony concerning their length of employment at UPS, their work performance, or their disciplinary record. However, plaintiff did introduce documents from the personnel files of Krug and Parks. These documents reveal that on March 30, 1982, Krug submitted a false timecard at the end of his shift. Parks had punched Krug's timecard at 4:45 p.m. even though Krug did not arrive at work until 5:30 p.m. Both Parks and Krug were discharged for this act on April 15, 1982. Both men appealed their discharge to the Metro Philadelphia Area Panel Grievance Committee, which is composed of an equal number of union and management representatives. The Grievance Committee reduced the discharges to suspensions, and both men returned to work on May 24, 1982. Parks was later given the opportunity to

work as a regular part-time package driver for UPS in April, 1983. Krug applied for a position as a driver in August, 1983, but the Court cannot find evidence in the record that he was ever promoted to that position.

16. Mark Caine began working at UPS in March, 1980, and resigned in June, 1984. Like the plaintiff, Caine was a disciplinary problem for UPS. During his sixty-one months with UPS, Caine received thirty-five write-ups and five Official Warning Letters. Most of this disciplinary action concerned Caine's poor attendance and failure to properly call and report to his supervisor when he would be unable to report to work. During the time period when Riley and Caine were both employed, Riley committed forty-eight infractions of UPS work rules while Caine committed twenty-two infractions. Caine was never discharged and left UPS voluntarily. (See Kostiuk)

CONCLUSIONS OF LAW

1. In this suit under Title VII of the Civil Rights Act, the plaintiff must prove by a preponderance of the evidence that his race was a "but for" cause for his termination. Lewis v. University of Pittsburgh, 725 F.2d 910, 915 (3d Cir.1983), cert. denied, 469 U.S. 892 (1984). In order to establish a prima facie case, the plaintiff must show that he was a member of a protected class, that he was discharged from a position for which he was qualified, and other employees not in the protected class were treated more faborably. Pollock v. A T & T, 794 F.2d 860, 864-65 (3d Cir. 1986); Pizzuto v. Perdue, Inc., 623 F.Supp. 1167, 1171 (D.Del. 1985). If the plaintiff establishes a prima facie case, the defendant must rebut the inference of discrimation by producing

evidence that the plaintiff was discharged for a legitimate, non-discriminatory reason. Worthy v. United States Steel Corp., 616 F.2d 698, 701 (3d Cir. 1980). Once the defendant has articulated a legitimate, non-discriminatory reason for its action, the plaintiff must prove by a preponderance of the evidence that the defendant's reason is merely pretextual and that the defendant "intentionally discriminated against the plaintiff." Belissimo v. Westinghouse Electric Corp., 764 F.2d 175, 180 (3d Cir. 1985).

2. The court concludes that Riley has established a prima facie case of racial discrimination. Riley is a black citizen who was discharged from his sorting position at UPS, a position for which he was at least minimally qualified, while it appears one white employee, Mark Caine, was not discharged from his position although

it appears he committed disciplinary offenses similar to plaintiff's, although Caine's offenses appear to be less in number and severity.

3. The Court concludes that defendant has articulated a legitimate non-discriminatory reason for the plaintiff's discharge, which is that plaintiff was discharged for good cause because of his poor work record and his long history of disciplinary violations which occurred during his employment at UPS.

4. As for the work records of Krug and Parks, the Court cannot conclude, based on the evidence presented, that these employees were treated more favorably than Riley by UPS. The Court has no evidence regarding the length of their employment or their work record prior to the single incident that was discussed at

trial, and there was no evidence or testimony concerning the rationale adopted by the Metro Philadelphia Area Panel Grievance Commitee when it reduced UPS's discharge of Krug and Parks to a suspension. Therefore, the Court concludes on the record before it that the work records of Krug and Parks were not comparable to the plaintiff's work record.

5. Finally, the Court concludes that the plaintiff has not established that the defendant's articulated reason for the discharge was pretextual. The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record and that the plaintiff's race was never a cause or factor in the defendant's decision to terminate Riley. 1 The Court concludes that the evidence at trial clearly demonstrated that it was Riley's conduct

and not his race that led to his many warnings and eventual discharge.

1/. Because the Court has concluded that the plaintiff has established a prima facie case, the Court will deny the defendant's motion for involuntary dismissal raised at trial. The Court will sustain plaintiff's objection to defendant's introduction at trial of twelve arbitration decisions involving interpretation of the UPS Collective Bargaining Agreement. The Court sustains plaintiff's objection on relevancy grounds.

An Order consistent with this Memorandum Opinion will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MALCOLM T. RILEY, II, :
:
Plaintiff, :
: Civil Action No.
: 83-811-JJF
v. :
:
UNITED PARCEL SERVICE, :
:
Defendant. :

O R D E R

At Wilmington this 30th day of June, 1988, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS ORDERED THAT Judgment is entered for the defendant United Parcel Service.

Joseph J. Farnan, Jr.
United States District Judge

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

②

NO. 89-306

IN THE
Supreme Court of the United States

October Term, 1989

MALCOLM T. RILEY, III,
Petitioner,
v.
UNITED PARCEL SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT UNITED PARCEL SERVICE

MARTIN WALD*
BRENDA C. KINNEY
SCHNADER, HARRISON, SEGAL & LEWIS
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Philadelphia, Pennsylvania 19103
(215) 751-2188

* Counsel of Record for Respondent

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

20pp

QUESTIONS PRESENTED.

1. Did the District Court properly apply the Title VII evidentiary standards to the facts and properly conclude United Parcel Service's reasons for discharging Riley were not pretextual?

2. Did the District Court properly conclude that UPS discharged Riley solely because of his abysmal work record, and there was no evidence of disparate treatment based on race, and race was not a factor in Riley's discharge?

3. Did the Third Circuit Court of Appeals properly affirm that the District Court, after a full trial correctly entered Judgment in favor of United Parcel Service?

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STATEMENT.

A. Introduction: Reasons for Denying the Petition.

Petitioner, Malcolm T. Riley, is nothing, if he is not persistent. The Delaware Human Relations Commission, the federal Equal Employment Opportunity Commission, the United States District Court for the District of Delaware, and the United States Court of Appeals for the Third Circuit have each held that Malcolm Riley's discharge from employment by United Parcel Service ("UPS") was proper, and that he was not discriminated against on the basis of race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq*. There are no novel legal issues presented by this routine, single plaintiff discharge case, and Mr. Riley has simply failed, repeatedly, to present any factual evidence of disparate treatment by UPS.

Mr. Riley has had his claims of racial discrimination investigated by both state and federal equal employment opportunity administrative agencies, and each concluded there was No Probable Cause to credit his allegations. After a full trial, in which Riley was represented by counsel, the District Court concluded Plaintiff had not established that UPS's reasons for his discharge were pretextual and there was no evidence of disparate treatment. The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record.

Mr. Riley next appealed, pro se, to the Third Circuit Court of Appeals where the panel for the Court unanimously affirmed the judgment for defendant, without opinion. Mr. Riley's subsequent pro se petition for a rehearing en banc, was also denied by the Third Circuit Court of Appeals.

Now, the pro se Petitioner, once again seeks review of these multiple adverse holdings, but fails to raise any novel factual or legal issues to warrant this Court's review. The Petition should be denied.

B. Procedural History of the Litigation.

Petitioner Riley was employed by United Parcel Service from September 1980 until April 16, 1982. Following his discharge for repeated failure to follow instructions, company methods and procedures, and overall poor work record, he grieved his discharge pursuant to his collective bargaining rights, as a member of a bargaining unit represented by the International Brotherhood of Teamsters ("I.B.T.") Local 326. A grievance hearing was held before the appropriate joint union-employer grievance committee, which upheld Riley's discharge. Thereafter, Riley filed charges of racial discrimination with the Equal Employment Opportunity Commission and the Delaware Human Relations Commission. Both the state and federal agencies investigated Riley's charges and found them meritless; each agency issued a Determination of No Probable Cause to credit Riley's allegations. (J.A. 111; 212-213).[1]

Mr. Riley next obtained counsel and filed suit in the District Court of Delaware, contending his discharge was on the basis of race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq*., and 42 U.S.C. § 1981. A three-day bench trial was conducted before District Judge Joseph J. Farnan, Jr. from September 21, 1987 through September 23, 1987. Following the trial, counsel for both parties submitted proposed findings of fact, conclusions of law, and supporting briefs. Upon reviewing the parties' submissions and evidence produced at trial, the District Court issued a Memorandum Opinion setting forth the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, on June

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[1] The designation of "J.A." refers to the Joint Appendix in the Court of Appeals. "Tr" refers to the trial transcript. "Dep." refers to portions of witness depositions which were read into the record at trial.

30, 1988. On that same date, the Court issued its Order entering Judgment in favor of the defendant, United Parcel Service.

Thereafter, Petitioner Riley filed an appeal, pro se, with the Third Circuit Court of Appeals, on November 2, 1988. The panel of Judges Stapleton, Greenberg and Scirica unanimously affirmed the Judgment of the District Court without opinion, on April 1, 1989. Mr. Riley then filed a Petition for Rehearing En Banc, which was denied May 3, 1989. He has continued to pursue his case by filing the instant Petition for Writ of Certiorari with this Court.

C. The Facts.

1. Riley's Abysmal Work History.

Riley's pro se Petition obscures the evidentiary facts presented to the District Court at trial, and reviewed by the Third Circuit panel, and presents a rambling narrative containing numerous references to material not in evidence. Based on the testimony and documents which actually *were* introduced into evidence, the Court concluded:

> "The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record and that the plaintiff's race was never a cause or factor in the defendant's decision to terminate Riley. The Court concludes that the evidence at trial clearly demonstrated that it was Riley's conduct and not his race that led to his many warnings and eventual discharge." (J.A. 10)

The facts which led the Court to these proper and inescapable conclusions were that Mr. Riley amassed an atrocious work performance record in a relatively brief period of time, that he was given numerous warnings and chances to improve his performance but failed to do so, and that there

was no evidence he was treated differently from other employees because of his race.

Malcolm T. Riley, III was employed by UPS from September 1980 until April 16, 1982 (J.A. 1240; Tr. 3A; 32A) at its Wilmington, Delaware facilities. He was initially employed as a parcel unloader and sorter during the pre-Christmas busy season from September through December 1980; thereafter, he worked as an on-call employee from January through March 1981 and in April 1981 became a regular full-time employee. (J.A. 124; 40A). Riley was a member of a bargaining unit represented by the International Brotherhood of Teamsters ("I.B.T."), Local 326. (Tr. B-19-20). Collective bargaining agreements and the past practice applicable to the interpretation of those agreements, provided that UPS administer a system of progressive discipline which could include verbal counsellings, verbal warnings, write-ups placed in an employee's file, center level hearings, official warning letters, suspensions, final warnings, and discharge. (J.A. 183; Mason Dep. p. 59; Tr. 156A).

There was undisputed testimony from UPS managers that UPS reviews and considers an employee's entire work record in determining appropriate discipline and discharge. (J.A. 219-220; 250; 256; 294-301; Tr. 11A-12A; 31A; B25-26; F-79; B-91; C32-44). When this progressive policy was applied to Mr. Riley, his cumulative work record was so unsatisfactory he was discharged.

The uncontradicted testimony of numerous UPS managers demonstrated that during Riley's brief employment, he was repeatedly counselled informally by his immediate supervisors for the need to improve his work performance. (Tr. D 100-110 Mason Dep. 13; Vones Dep. 11). He was written up for job related problems, and spoken to concerning the need to improve. Riley's job performance was found unacceptable in various respects by eight different supervisors acting inde-

pendently, each of whom issued some form of progressive discipline to Riley in an effort to correct his work deficiencies.

In total, Malcolm Riley received three separate Official Warning Letters for unacceptable attendance and for failure to follow instructions; two suspensions for unacceptable attendance; and one suspension for throwing a package which was changed to a Final Warning. In addition to the Warning Letters, center meetings, hearings, and suspensions, Mr. Riley was written-up for forty-eight separate repeated infractions of UPS rules and procedures. These write-ups were issued by eight different supervisors, who testified credibly concerning Riley's misconduct for lateness, absenteeism, no-shows, failing to call in and report his absences, slow package sorting, using improper sorting procedures, damaging packages, smoking in unauthorized areas, missorting packages, and throwing packages.

On February 25, 1982, approximately one month prior to his discharge, Riley was given a "Final Warning", (J.A. 183, Ex. D-2; Tr. 156A) for throwing packages. Riley had been observed by two separate supervisors hurling packages like frisbees, (J.A. 222-224; Tr. B-30). The final warning was based upon "a complete review of your [Riley's] work record" and specifically cited his (1) continual failure to follow instructions, company methods and procedures; (2) unacceptable, insubordinate attitude toward supervisors; and (3) prior numerous center level hearings, three Official Warning Notices, and two prior suspensions.

Less than a month and a half after Riley was issued the final warning, he again violated UPS work rules by reporting to work late, not reporting to work and not calling in, and missorting an unacceptable number of packages. His complete record was reviewed and he was discharged effective April 14, 1982 for his continual failure to follow instructions,

company methods and procedures, and overall work record. (Ex. D-1; J.A. 183-185; Tr. 156A-161A).

In stark contrast to this evidence of Riley's repeated work rule violations and cumulative poor performance, Riley failed to produce any credible evidence of white employees at UPS with similar unsatisfactory work histories. While he attempted to present portions of the personnel records of two employees who had been discharged for time card violations, there was no evidence concerning these employees' overall work record, seniority, or infractions, and therefore, no facts in the record from which the District Court could draw any factual inferences between the disciplinary history of Riley and other co-workers: ". . . the court concludes on the record before it that the work records of Krug and Parks were not comparable to the plaintiff's work record." (J.A. 10; See Court's Conclusion of Law No. 4).

A third former UPS employee, Mark Caine, was the only witness who testified on behalf of plaintiff, but there was ample factual evidence that Riley's work record was far worse than Caine's: Riley had almost twice as many rules infractions as Caine during the same time frame. (J.A. 215; Tr. B-17-18).

Riley presented no other facts concerning the comparative treatment of other employees at UPS. In contrast to plaintiff's lack of evidence of disparate treatment, a UPS Division Manager with 23 years management experience at UPS credibly testified that his job duties required him to review numerous personnel files, and that he had never seen a file comparable to Mr. Riley's of a white employee who was still employed by UPS. (J.A. 186; Tr. 161A).

Not only was there no evidence of any employees with abysmal records like Riley's, but there was evidence that the discipline itself was applied fairly to all employees. Each of UPS's supervisors and former supervisors who testified at the trial confirmed that he or she administered company rules evenhandedly, regardless of race. (Tr. 158A-162A; B-66;

B-102; B-154; Donahue Dep. pp. 9-10; Vones Dep. p. 34-35; Wink Dep. pp. 21-23; Mason Dep. pp. 16-17). Even plaintiff's own witness, Mark Caine, testified that an employee's race had nothing to do with the treatment received from UPS supervisors. (J.A. 172-174; 136A).

Moreover, the plaintiff's own conduct belied his charge of disparate treatment based on race. Never at any time during his employment at UPS did Riley claim he was being mistreated, disciplined or discharged because of his race. UPS presented evidence that Blacks have risen to supervisory and managerial positions within UPS (Tr. B-57), that UPS has capable full time human resources, personnel, and affirmative action staffs, and that a Black held a position as Assistant Steward in the facility where Riley worked. This union official was present representing Riley at many of his disciplines. (Tr. B-29). If Riley truly believed he was being harassed or treated differently because of his race he could have raised this claim at any time during his employment to any of these persons. Yet he did not do so. Only after his discharge was sustained by the joint union-employer grievance panel, did Riley for the *first* time, claim racial discrimination to the EEOC and the Delaware Human Relations Commission. And these two enforcement agencies each investigated this frivolous race claim and issued No Probable Cause Determinations.

ARGUMENT.

The petition for a writ of certiorari does not present any issue warranting review by this Court.

I.

The Court of Appeals Affirmed, Without Opinion, the District Court's Proper Application of Title VII Evidentiary Standards and Concluded Riley Failed to Establish UPS's Reasons for Discharge Were Pretextual.

The law has been settled for more than a decade, now,

that in a single plaintiff disparate treatment case, alleging employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e-5(e), the plaintiff must prove by a preponderance of the evidence that his race was the determinative factor in the decision to discharge him. The United States Supreme Court's landmark evidentiary decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) established the evidentiary "game plan" for demonstrating how discrimination must be proven by the evidence: first, the grieved employee must make out a *prima facie* case of discrimination. In discharge cases, this may be done by showing plaintiff was a member of a racial minority; was minimally qualified for the position; was discharged; and other non-minorities were not so discharged. *Pollack v. AT&T,* 794 F.2d 860, 864-65 (3d Cir. 1986); *Pizzuto v. Perdue, Inc.*, 623 F. Supp. 1167, 1171 (D. Del. 1985). Once the *prima facie* case has been presented, the burden of production shifts to the employer to articulate some non-discriminatory reason for the termination. *McDonnell Douglas v. Green, supra; Lewis v. University of Pittsburgh*, 725 F.2d 919, 914 (3d Cir. 1984), *cert. denied,* 469 U.S. 892 (1984); *Worthy v. United States Steel Corp.*, 616 F.2d 698, 701 (3d Cir. 1980). Thereafter, once such a facially neutral legitimate business reason has been articulated by the employer for its decision, the production burden shifts back to the employee who must then bear the burden of demonstrating that the business reason given by the employer, was, in fact, a mere pretext to obscure racially discriminatory animus and actions. The evidentiary burden of proof on the plaintiff is the "preponderance of the evidence" standard.

This Court has emphasized that the plaintiff must prove that the defendant employer intentionally discriminated against him. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) this Court reiterated that: ". . . the ultimate burden of persuading the

trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff . . ." (at 253).

The *McDonnell Douglas* test and *Texas Department of Community Affairs* evidentiary standard has been articulated and applied by the Third Circuit Court of Appeals to require a "but for" showing: a plaintiff cannot prevail in a claim of racial discrimination in employment under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e) and 42 U.S.C. § 1981 unless he can prove by a preponderance of the evidence that his race was the determinative factor in the decision to discharge him and "but for" his race, he would have been retained in employment. *Lewis v. University of Pittsburgh*, 725 F.2d 919, 914 (3d Cir. 1984), *cert. denied*, 469 U.S. 892 (1984).

The District Court correctly applied this settled law to the facts, and concluded that Appellant Riley failed to meet his evidentiary burden to prove that "but for" his race, he would not have been discharged. As the District Court correctly reasoned: "Once the defendant has articulated a legitimate, non-discriminatory reason for its action, the plaintiff must prove by a preponderance of the evidence that the defendant's reason is merely pretextual and that the defendant 'intentionally, discriminated against the plaintiff.' *Belissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 180 (3d Cir. 1981." (J.A. 9).

In this case, Malcolm Riley demonstrated he was Black, he held the position of sorter at UPS for a brief period of time, he was discharged, and others were not. UPS articulated the business basis for its discharge decision: the cumulative poor work record amassed by Riley in a relatively brief period of employment. There the evidence stopped. Riley failed to present any credible evidence that discharging him for his poor record was a pretext, or any proof that racial

discrimination caused his discharge because whites with records as bad as his were not discharged.

The District Court concluded and the Third Circuit Court of Appeals affirmed, that Riley's evidence was sufficient only to establish a minimal "bare bones" *prima facie* case of racial discrimination based on the testimony of Mark Caine, that he was white and was not discharged. However, the District Court observed that while Caine may have committed disciplinary offenses, they were not comparable to plaintiff's: "Caine's offenses appear to be less in number and severity." (J.A. 9; Conclusion of Law No. 2).

While the District Court concluded Riley had made out a minimal *prima facie* case, Riley failed to go forward with evidence sufficient to rebut UPS's business reason for the termination and prove pretext. In *Lewis v. University of Pittsburgh*, the Third Circuit Court of Appeals emphasized that nothing in *McDonnell Douglas* "in any way relieve(s) the employee of his basic burden of proof." And this burden of proof and "but for" causation is required both under Title VII and § 1981. "We are satisfied . . . that Title VII and sections 1981 and 1983 all require a showing of 'but for' causation in an employment discrimination suit." *Lewis v. Univ. of Pittsburgh, supra* (at 914). Riley presented no such evidence.

Last term, the United States Supreme Court again revisited the framework for proof in disparate treatment employment cases and reaffirmed its prior holdings. In *Patterson v. McLean Credit Union*, No. 87-107 ____U.S. ____, 57 L.W. 4705, 4710 (June 15, 1989) this Court observed:

> "We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue of whether the defendant intentionally discriminated against the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell*

> *Douglas Corp. v. Green*, 411 U.S. 792 (1973) . . . this scheme of proof, structured as a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical issue of discrimination,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) should apply to claims of racial discrimination under § 1981."

In reviewing the plaintiff's evidence in *Patterson* this Court emphasized that there is no single way to prove intentional discrimination; the petitioner is free to present a variety of different forms of evidence which may demonstrate the employer's reasons for its actions are pretextual. *Patterson v. McLean Credit Union, supra*, at 4711. Yet, even measured by this broad evidentiary standard, here, Petitioner Riley simply failed to present any credible, relevant evidence of pretext. The appropriate legal precedents were correctly applied by the Courts below, and the evidentiary conclusion was inescapable: Petitioner Riley failed to present any facts to demonstrate UPS's business reasons for discharging him were mere pretext, or that whites were treated better than he was.

In fact, in this case, Riley simply failed to present any plausible evidence that he was treated differently from similarly situated employees who were non minorities. Where plaintiff fails to show how a similarly situated non-minority was treated, plaintiff cannot prevail. *Bellissimo v. Westinghouse Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986); *Molthan v. Temple University*, 778 F.2d 955 (3d Cir. 1985); *Bluebeard's Castle Hotel v. Government of Virgin Islands*, 768 F.2d 168 (3d Cir. 1986).

The District Court applied the correct evidentiary standard and concluded that UPS articulated legitimate nondiscriminatory reasons for Riley's discharge due to his "long history of disciplinary violations." (J.A. 9; Conclusion of Law No. 3). By contrast, Riley failed to present evidence that

white employees were treated more favorably (J.A. 10; Conclusion of Law No. 4), and failed to present evidence to prove UPS's articulated reasons for discharge were pretextual. (J.A. 10; Conclusion of Law No. 5).

II.

The Evidence Presented at Trial Clearly Demonstrated That UPS Discharged Riley Solely on the Basis of His Abysmal Work Record.

UPS's "articulated reason" for discharging Riley was his poor work record, and Riley failed to show this business reason was "pretextual." As the District Court properly concluded:

> "The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record and that the plaintiff's race was never a cause or factor in the defendant's decision to terminate Riley. The Court concludes that the evidence at trial clearly demonstrated that it was Riley's conduct and not his race that led to his many warnings and eventual discharge." (J.A. 10; Conclusion of Law No. 5).

It is undisputed that Malcolm Riley was a relatively short-term employee with UPS who gained a full-time employee position in April 1981, and was discharged only a year later after amassing a staggering number of disciplinary write-ups, formal written warnings, center level hearings and suspensions, which culminated in his discharge for ". . . continual failure to follow instructions, company methods and procedures, and overall work record." (Ex. D-1).

Riley's overall work record demonstrated he had a continuing problem with lateness and attendance; he repeatedly failed to show up on time for scheduled shifts and often failed

to call and inform UPS he would be late or unable to come in until after his shift started.

The evidence showed that Riley's job was to sort packages—something UPS has been doing capably for years. Yet, Riley seemed to delight in refusing to sort packages the way his employer wanted it done. He would sort to the wrong direction, missort, attempt to slow down the speed of work, and even on occasion was caught throwing packages. His attitude toward his work and many of his supervisors was uncooperative and insubordinate. He seemed to violate even the simplest rule—for example, smoking in work areas where smoking was prohibited.

Riley was written up for these problems by eight different supervisors on forty-eight separate occasions but such patient, progressive discipline failed to correct his poor performance. Riley did not seriously dispute his voluminous disciplinary history, but at trial portrayed himself as a man who was being picked on. By contrast, virtually every supervisor testified they disciplined all employees uniformly whenever they observed them missorting packages, throwing parcels, smoking where prohibited, or abusing the lateness and absenteeism policy. Progressive discipline was applied to blacks and whites alike. During a three-day bench trial, Riley was not able to produce any facts to show that these reasons for discharge set forth by UPS were pretextual.

III.

There Was No Evidence of Disparate Treatment and the Courts Below Properly Concluded That Plaintiff's Race Was Never a Cause or Factor in His Discharge.

In the factual context of this case, Riley could not prevail unless he proved by a preponderance of the evidence that there was a white UPS employee who amassed as poor a work

record as his in the same short employment span, and the white employee was not discharged because he was white. There is no such evidence.

No direct evidence of overt racial harassment or discrimination against plaintiff was presented, and the District Court properly concluded that the personnel records of two white employees that Riley introduced were totally dissimilar.

Plaintiff's only other evidence was the testimony of a former white co-worker, Mark Caine. Yet, the records and work histories of Caine and Riley were not comparable. They worked at different periods; there was no showing they had similar supervisors; they performed different jobs; they had different lengths of tenure; Caine had a cleaner record than Riley's during his probationary, pre-seniority period; and Caine had received far fewer disciplines than Riley. Most significantly, to the extent there was dissimilar treatment between employees in general, or between Caine and Riley, Caine himself repeatedly testified the differences were not based on race.

The testimony of Caine and the comparison of his record to Riley's clearly demonstrates Riley's record was far worse. Thus, this case is analogous to the fact situation reviewed by the Third Circuit Court of Appeals in *Bluebeard's Castle Hotel, supra* at 172-3. The Court reversed a finding in favor of a white employee who had been discharged for abusive behavior on the grounds the plaintiff had not produced any evidence that similar abusive misconduct by a black employee would have been dealt with more leniently. To show that the employer's business justification for discharge is a pretext, the white employee with the bad conduct would have had to show that a black employee who had the same misconduct was not terminated.

In *McDonnell Douglas, supra* 411 U.S. at 804, this Court observed, that to prove pretext and racial discriminatory treatment against a minority, it is relevant to show that

employees outside the protected minority group who were "involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired." Here, Riley produced no evidence of any white employees who had work histories of "comparable seriousness" and had been retained. To the contrary, UPS managers uniformly testified they knew of no white employee who had been allowed to continue UPS employment with a record as bad as Riley's. (J.A. 186; Tr. 161A).

Moreover, the mere inference of disparate treatment raised by Caine's testimony is insufficient to overcome UPS's direct evidence that there was no racial discrimination in Riley's disciplinary history. In ***Blue Beard's Castle Hotel***, the Third Circuit Court of Appeals took special note of the distinction between inferences of discrimination and the requisite direct evidence of discriminatory intent: ". . . in determining whether there is substantial evidence to support a finding of pretextual discharge, it is helpful to keep in mind that evidence of disparate treatment is used to infer intentional discrimination by the employer—it is not, however, direct evidence of such intent." at 172.

In this case, there was ample direct testimony from UPS supervisors that race was not a factor in disciplinary decisions. Even plaintiff's own witness, Mark Caine, candidly admitted that race was not the reason some employees were disciplined more harshly than others or supervisors "rode" some harder than others. (Tr. 136A-137A). Thus, rather than present direct evidence of racially discriminatory intent, plaintiff's own witness testified to no racial intent whatsoever.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: September 21, 1989

Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

③

NO. 89-306

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Malcolm T. Riley, III, Petitioner

vs.

United Parcel Service, Respondent

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF PETITIONER MALCOLM T. RILEY, III, pro se

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Malcolm T. Riley, III, pro se
12 Stalwart Drive
Newark, Delaware 19713

It wasn't until I appealed my denial of unemployment benefits case to the Superior Court of the State of Delaware that a Superior Court Judge took the time to understand the specific circumstances surrounding all of the issues and correctly found in my favor. At that time, the specifics surrounding my unlawful discharge were articulated in a fashion that clearly showed the pettiness and pretext that UPS used to set me up for an unlawful discharge.

Now, more than six years later, I again have to go before the highest Court in order to have discerning eyes examine issues and facts so that an accurate decision can again be made.

Specifically, this Honorable Court must be able to see through the smoke screen that Counsel for the Respondent has created.

Counsel for the Respondent, Mr. Martin Wald is nothing, if he is not adroit at skirting the true issues. He repeatedly "manufactures" testimony that appears nowhere in the record.

"A"	refers to appendix A that I filed in the Third Circuit Court of Appeals.
"B"	refers to appendix B that I filed in the Third Circuit Court of Appeals
"OB"	refers to my opening brief in appeal to the Third Circuit Court of Appeals.
"AP"	refers to the Appellee's Brief filed in the Third Circuit Court of Appeals
"RB"	refers to my reply brief in appeal to the Third Circuit Court of Appeals
"BIO"	refers to UPS's Brief in Opposition to Petition for a Writ of Certiorari

In the Respondent's Brief in Opposition, Mr Wald has again:

- a.) refused to address issues raised in my petition.
- b.) used "facts" that are unfounded and not true by concurring with Judge Joseph J. Farnan's inaccurate finding of fact.
- c.) referred to and used innacurate information to formulate conclusions in an innocuous, sarcastic manner.

Mr. Wald repeatedly downplayed substantiated fact and tried to strip pertinent issues of their credibility because they are detrimental to his position.

Unlike Mr. Wald, I will address every issue that he presents in his brief. Then I will re-address every issue that Mr. Wald chose to ignore. I will also demonstrate how Mr. Wald intentionally misinterprets law i.e. the "but for" test. On more than one occasion, Mr. Wald states that "race must be <u>the</u> determining factor" in a case such as this. In actuality, race only need be "<u>a</u> determining factor".

On page one of Mr. Wald's brief, he refers to procedural history. What Mr. Wald fails to reveal is that after I wrote to the Director of the EEOC, my case was re-opened "due to the totality of information now available". The information about which this statement refers are specifics that I brought up to the EEOC after they initially issued a no probable cause finding. (A-106 through A-109). In this document, I pointed out how incomplete the information base upon which the Delaware Human Relations Commission used to draw conclusion was, how uninformed the investigators were, and what additional questions had to be asked so that

all facts were exposed. What Mr. Wald "forgets" to mention is that the additional information that the EEOC requested of Mr. Wald and UPS was intentionally sanitized. (see the bottom of page 10 through page 12 of OB and A-78). After this case was at the District Court level of investigation, the information that the EEOC requested mysteriously reappeared (A-43 through A-52). Mr. Wald again refuses to respond to this issue.

On page two of Mr. Wald's Brief, he refers to the fact that Third Circuit Judge Joseph J. Farnan issued a Memorandum Opinion. Mr. Wald and the Third Circuit Court of Appeals ignored fifteen pages of rigorous, direct contest of what was considered finding of fact (see OB pages 1-15).

On page three of Mr. Wald's document to this Court, he attempts to mislead this Court by oversimplification of facts, making mention of issues that are not fact and never were facts, and he refers to numerous warnings that I had no knowledge of until years after my unlawful discharge from UPS. I was never a full-time employee, (see page 5, OB), I never received 48 warnings concerning anything (see OB,pages 8 and 9). Mr. Wald and Judge Farnan both refer to this number 48 as discliplines --however this number included a substantial number of other documents such as safe work method evaluations, sorting tests, and general employee-employer bi-annual meetings. Also, THE NUMBER 48 INCLUDES TWO AND THREE "write-ups" CONCERNING THE SAME INSTANCE!!!! (see A-43 through A-51, A-56 through A-59, A-31, A-32, A-233 lines 24 and 25, and A-234 lines 1-11).

Inspection of pages A-47, A-63, A-258 lines 13 and 14 and A-307 will show four different supervisors instructing me to perform the same task in four distinctly different ways. Again, with Mr. Wald's misleading style, he has

oversimplified this data as me being "confused about how to capably sort packages". Yet in Mr. Wald's words, supervision levies "write-ups" and "discipline" uniformly. AGAIN, MR. WALD INTENTIONALLY MISLEADS THIS MOST HONORABLE COURT!!!!!!

I have pointed this and other issues out to Mr. Wald and the Third Circuit Court of Appeals and they seem to ignore these blatant facts. Mr. Wald continues to refer to data that he knows is not fact.

On page 4 of Mr. Wald's document, the credible witnesses to whom he refers contradict the word credible. One of his witnesses who helped me out of a tractor-trailer after a chemical spill doesn't even remember any spill--one that he, in actuality, witnessed on two separate occasions. Another witness claims to have never witnessed anyone ever throwing a package other than me. It is uncontradicted that package throwing was a part of the business and went on everyday and was done by everyone. Another witness never saw anyone ever throw packages.

On page five of the BIO, Mr. Wald mentions several alleged violations of work rules. I have throughly addressed all of these issues in my appeal. (see pages 15 through 19, OB). On this same page (page 5, BIO), Mr. Wald refers to the famous letter of February 25, 1982, the Respondent's most pivotal, illegimate citing of disclipline. (RB, page 24 and 25). The specifics of this letter have been mentioned on a multitude of occasions (pages A-107 and A-108, OB pages 17 through 21, RB page 4). The only person to acknowledge this is Superior Court Justice Vincent J. Poppiti. This final warning is critical to UPS's "articulated business reason for discharge" even though it cites issues as progressive that had not ever occurred. **HERE, IS WHEN UPS HAD TO ACT IMMEDIATELY IN ORDER** TO HAVE ANY CHANCE TO

GET RID OF ME. AS I SAID ON NUMEROUS OCCASIONS, ONE EXCUSED ABSENSE WITH A DOCTOR'S EXCUSE, ONE LATENESS BY A MATTER OF TWO MINUTES THROUGH NO FAULT OF MY OWN, AND AN UNWARRANTED, UNJUSTIFIED CITING OF MISSORTED PACKAGES that could not even be definitely linked to me do not separately or cumulatively constitute anything but pretext. As is obvious, the numbers 14 and 7 as far as a problem number of missorts and as far as being outside of attainable company standards is ridiculous. (please throughly read page 20, OB). By admission of UPS officials, 95% -98% accuracy is a corporate standard.(A-199 lines 1 through 5). How can someone cite anyone for a minimal number of missorts well below this standard in conjunction with the large number of incorrect zip codes that come through the system on a daily basis unless pretext is first and foremost??????

How is anyone going to perform and succeed at a job when there are several people at any given time putting their heads together just looking for something--however trivial--that they can document as a "set-up" for discharge on twisted, phony, untrue grounds?

In a nutshell, as has been articulated <u>on record</u> since the inception of this lawsuit, UPS showed obvious pretext when they unlawfully discharged me knowing all along that their statute of limitation would expire if they did not make a move for discharge within the next two weeks of my employment. (see A-21).

The crux of this matter -- aside from the fact that most of the data contained in my personnel file should not have even been there-- is that my personnel record was clean for the last eight and one-half months of my employment barring the disputed letter of February 25, 1982. This letter did not refer to anything that I had ever been disciplined

for previously. This letter shows an obvious attempt to make yet another false entry into my personnel file. This act also denied me an opportunity to rectify what UPS considered a previous problem. (see rehabilition, OB-28. OB-21, A-122 lines 11-23, A-295 lines 20-25, A-296 lines 14-17). The day after I was "written-up" for throwing a package, ten-foot "jam-bars" were introduced in a training session so that the need for throwing packages would be alleviated. (OB-16 through 19, A-109).

It was my Union representative to whom Mr. Wald refers, a gentleman named Mr. Harmon Wilson, that told me to make sure that I pursue this issue with the anti-discrimination authorities. He also told me that he was discharged from UPS under the same type of phony, pretextual reasons as I, and it was the United States Court System that re-instated him to his postion and guaranteed him upward mobility. He has since been placed into a full-time position and had been appointed the Assistant Union Steward.

UPS's articulated business reason to which Mr. Wald refers is based upon non-credible data. The entire argument that Mr. Wald cites here is a clear demonstration of pretext, set-ups, pencil-whippings, etc. Suspensions that should have never occurred, personnel file entries from temporary supervision, and memorialization of trivial issues such as getting a drink of water and untied shoes are examples of what Mr. Wald calls "articulated business reasons".

It is a fact that similarly situated Caucasion employees were treated more favorably than I for doing far worse things. Similarly situated Mark Caine committed "cardinal sins" that were observed by supervisors but were not documented. Mr. Caine was not fired, was not even disciplined for major infractions i.e.

intentional damage to packages, using abusive language directed at supervision (A-160), intentionally missorting large numbers of parcels, calling a work stoppage (walk-off -- "a cardinal sin"), etc. but it was me who was cited for insubordination of which I was not guilty. **Yet, in Mr. Wald's words, discipline was uniformly applied.**

Mr. Wald's "so-called" credible witnesses admit to unequal application of rules. (A-249 through 253).

On several occasions in the BIO, Mr. Wald again "twists" fact into self-serving testimony by attempting to say that Mr. Caine said that the disparate treatment that I received from UPS was not not racially movtivated. **IN ACTUALITY, MR. CAINE QUITE SIMPLY SAID THAT HE "COULD NOT READ MINDS".** (RB-5, TR 141A).

Mr. Caine also testified that he on several occasions heard UPS managers refer to employees (never to their faces) as "niggers". (A-173, lines 14 through 18).

Keith Krug and Charles Park were guilty of cardinal sins (proven theft and dishonesty, stealing company time, and intentionally defrauding the company) yet both of these Caucasion gentlemen were retained and promoted, while at the same time I was fired on pretext.

Mark Caine admitted to intentionally missorting hundreds and hundreds of packages (at least 750 to be exact) on several different days because a supervisor "pissed him off". (A-170). Mr. Caine was retained for his deeds while I was fired for unintentionally missorting a minimal number of parcels (less than one percent). Yet to Mr. Wald, discipline was uniformly applied.

Another incidence of disparate treatment surrounded a chemical spill. When I was the only person exposed to dangerous chemical fumes, my missing work due to illness was

punished by an unpaid suspension in addition to unpaid sick days. Four months later, when I and my Caucasion co-workers were exposed to the same chemical, the result was excused sick days with pay for everyone exposed. (A-129 lines 18-25, A-130 lines 1 through 8, A-130 lines 9-25, A-164 lines 15-25, A-165 lines 1-14, A-327through 329, A 35-38, A-54, A133 lines 15-25).

Mark Caine was the insubordinate employee--not me. Caine, Parks, and Krug were the employees who committed "cardinal sins" --not me. UPS repeatedly entered lies into my personnel file and "dressed them up in a misleading uniform" and used them as progressive discipline so that could discharge me for racially motivated reasons. Yet, I was fired and unemployed for three years, while my Caucasion counterparts were retained and promoted.

A center-level manager at UPS admitted in Court that he talks to employees before administering discipline so that an attempt to rectify the problem could be made. When asked if he did this in my (Mr. Riley's) case, his response was simply "No. I suspended him". (A-250, lines 8-18).

In conclusion, it is respectfully prayed that this Honorable Court grant my Petition for a Writ of Certiorari in the Interest of Justice.

Respectfully Submitted,

Malcolm T. Riley, III, pro se